Supreme Court of the United States

OCTOBER TERM, 1942

No. 824

METROPOLITAN-COLUMBIA STOCKHOLDERS, INC., and LAWRENCE WARDS ISLAND REALTY COMPANY,

Petitioners,

vs.

THE CITY OF NEW YORK.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Of Counsel.

April 26, 1943.

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Your petitioners in submitting their reply brief respectfully contend:

That the question of title to damage parcels is *res judicata.* The matter of the deeds to Marsh having been raised in the *Beach* case (45 Howard 357) it can not be again raised between the same parties. *Res judicata* settles the controversy between the parties to it. *U. S.* v. *Pink,* 315 U. S. 203, at 216; *Aurora City* vs. *West,* 74 U. S. 82, at 102-103; *Kelliher* vs. *Stone & Webster,* C. C. A. Fla., 75 Fed. 2nd, 331, 332.

The relation back of the Water Patent of 1811 to its inception in 1809 refutes the claim of title by the City based on the deeds to Marsh, which were executed and dated four months after the inception of the Water Grant. *Stark* vs. *Starr,* 6 Wallace 402, at 418.

In interpreting the Grant of 1888 (City Ex. 30, R. 224) and Chapter XXIV, Laws of State of New York, 1813

(R. 19-20, Claimants' Objections Nos. 11 and 12), the Supreme Court judgment, as affirmed by the Court of Appeals, has construed them in such a manner as to impair the obligations of the deed given by the State to the predecessors in title of your petitioners contrary to Article 1, Section 10 of the United States Constitution, and as to deprive your petitioners of property without due process of law contrary to the Fourteenth Amendment of said Constitution. *Appleby* vs. *New York*, 271 N. Y. 364, 374; *Fletcher* vs. *Peck*, 6 Cranch. 87, 137; *Farrington* v. *Tennessee*, 95 U. S. 679, 683; *Stewart* vs. *Jefferson Police*, 116 U. S. 135; *Woodruff* vs. *Trapnall*, 10 How. 237.

The question of adverse possession is *res judicata*, having been settled in the *Beach* case, *supra; U. S.* v. *Pink*, *supra*. For the court below to have based its decision on adverse possession in the instant case is unconstitutional and contrary to the Fourteenth Amendment as a taking of property without due process. It is for the City to come in now and justify this taking.

Title to the bank of a navigable river may not be acquired by adverse possession.

The banks of a navigable river from the high bank on one side to high bank on the other and the land under water are held by the civil law to be a public highway. Justinian Twelve Tables, Lib. II, Title I, Sections 1 to 5, pages 67-68 Cooper's Justinian. The Magna Charta of England recognizes this: Section 33, provided as follows:

> "All wears for time to come, shall be put down in the rivers of Thames and Medway and throughout all England, except upon the sea coast."

This rule was followed in *Arnold* vs. *Mundy*, 6 N. J. Law 1; *Martin* v. *Waddell*, 16 Pet. 367 at 418.

Section 40 of the New York Civil Practice Act provides the only methods by which adverse possession may be acquired not under a claim of color of title:

"1. Where it has been protected by a substantial enclosure."

"2. Where it has been usually cultivated or improved."

These damage parcels were never fenced in or cultivated or improved, and the awarding of Damage Parcels 16c and 17 to the City is unconstitutional and contrary to the Fourteenth Amendment. *Ward* v. *Cockran,* 150 U. S. 597, at 609. The trial court is therefore clearly in error.

The City does not explain why it did not exempt the U. S. Lighthouse plot when it filed its petition to ascertain compensation. It exempted other parcels. The award to the City of the area covered by the U. S. Lighthouse deed is unconstitutional, being a taking of property without due process and without just compensation contrary to the Fourteenth Amendment.

The award by the Trial Court of the value of one dollar for damage parcels 16c and 17 is unconstitutional and violative of the due process clause of the Fourteenth Amendment of the Federal Constitution as failing to award just compensation. The decision was on an erroneous theory of value that the damage parcels had no value unless filled in. This finding by the Trial Judge had no support in the evidence in the record. *New York* v. *Sage,* 239 U. S. 59 at 61; *Boom* v. *Patterson,* 98 U. S. 403, at 407.

The holding by the Trial Judge that the upland owner had a broad easement of access over the damage parcels of petitioners is contrary to the ruling decision that the upland owner has only a reasonable easement. It is a taking of property without just compensation contrary to the Fourteenth Amendment. *Hedges* vs. *West Shore,* 150 N. Y. 150, which is a case of a riparian owner devoting property to certain uses inconsistent with the existence of a structure in a public river some two hundred feet below high-water mark, and between the plaintiff's upland property and the navigable channel, constituting an obstruc-

tion to the plaintiff's access from its property to the channel.

Jurisdiction of this Honorable Court requires no argument. It is sustained by *Chicago, Burlington & Quincy Railroad Co.* v. *Chicago*, 166 U. S. 226, at 237, 239 and 264.

The cases cited by the City are not on all fours with the instant case and do not support the points on which they are cited. Every one is easily distinguishable.

In Conclusion

Title to the damage parcels is *res judicata*. The question of adverse possession is *res judicata*. The ignoring of the rule of *res judicata* by the Trial Court in awarding titles to the City is arbitrary and contrary to the provisions of the United States Constitution relating to due process as set forth in the Fourteenth Amendment.

Petitioners respectfully submit the writ of certiorari should be granted.

April 26, 1943.

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